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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1484

ROBERT SCHOOP and
WILLIE LEE DAWKINS, *Petitioners*

v.

JOHN N. MITCHELL, Attorney General of the United States, J. EDGAR HOOVER, Director, Federal Bureau of Investigation, and JERRY V. WILSON, Chief, Metropolitan Police Department of Washington, D. C., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Robert Schoop and Willie Lee Dawkins, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 22, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, was embraced in its order of dismissal which is set forth in the appendix hereto. The opinion of the United States District Court for the District of Columbia, not yet reported, is also set forth in the same appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 22, 1971. No petition for rehearing was filed. This petition for certiorari is filed within ninety days from the date of judgment in the Court of Appeals. This court's jurisdiction is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

1. Can the Fugitive Felon Act, 18 U.S.C., Sec. 1073, consistent with its legislative history and the free speech requirements of the Constitution, be applied so as to make it a federal crime to leave a state to avoid prosecution under a state statute which, by reason of its overbreadth, raises substantial constitutional questions under the First Amendment?

2. Can warrants of arrest properly issue under such act upon the authority of a local United States Attorney or his Assistant without also complying with the requirement of the act that "Violations of this section may be prosecuted . . . only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated"?

3. Can warrants of arrest properly issue under such act where, as the complaint here alleges in specific detail, the federal authorities do not intend a good faith prosecution for the purpose of securing a conviction, but intend instead to use the outstanding warrants

(a) to investigate, embarrass, and harass a controversial political movement, and

(b) to arrest leaders of the movement, turn them over to local authorities for extradition on a different charge, and then drop the federal charge for the purpose of avoiding judicial review of their actions?

4. May the foregoing questions be raised in a federal court suit against federal officers to enjoin the attempted or threatened execution of such federal warrants where:

(a) the plaintiff, as in the *Schoop* case, has not surrendered to federal law enforcement agents at the time of filing suit, but offers to do so under a protective order of court which would preserve the status quo while his rights were being litigated, or

(b) the plaintiff, as in the *Dawkins* case, surrendered to federal agents shortly after filing suit, but without a protective order, and while his case was on appeal, the government dismissed the warrant at a preliminary hearing in an attempt to moot his case?

The District Court held the questions presented insubstantial and dismissed the complaint. The Court of Appeals, without ruling on the substantiality of the issues raised by the complaint, dismissed the action as to Schoop because he was a "fugitive," and as to Dawkins because the case was "moot."

STATUTORY PROVISIONS INVOLVED

The Fugitive Felon Act

United States Code, Title 18:

Sec. 1073. **Flight to Avoid Prosecution or Giving Testimony.** Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees, or which, in the case of New Jersey, is a high misdemeanor under the laws of said State, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, or which in the case of New Jersey is a high misdemeanor under the laws of said State, is charged, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement and only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated. *(As amended by Act of October 4, 1961, P. L. 87-368, 75 Stat. 795).*

Prior to the 1961 Amendment, this section read as follows:

Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for murder, kidnaping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, arson punishable as a felony, or extortion accompanied by

threats of violence, or attempt to commit any of the foregoing offenses as they are defined either at common law or by the laws of the place from which the fugitive flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by imprisonment in a penitentiary is charged, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement. *(Per Congressional Record, September 20, 1961, p. 20463, being text of Act of May 18, 1934, c. 302, 48 Stat. 782, as amended August 2, 1946, c. 735, 60 Stat. 789, and further amended August 20, 1954, c. 771, 68 Stat. 747.)*

While this case was pending, Congress passed the Organized Crime Control Act of 1970 (Act of October 15, 1970, P. L. 91-452) which amends Section 1073 to read as follows (additions to 1961 Act shown by italics)

Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees, or which, in the case of New Jersey, is a high misdemeanor under the laws of said State, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, or which in the case of New Jersey, is a high misdemeanor under the laws of said State, is charged, *or (3) to avoid contempt proceedings for alleged disobedience of any lawful process requiring attendance and the giving of testimony or the*

production of documentary evidence before an agency of a State empowered by the law of such State to conduct investigations of alleged criminal activities, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement, *or in which a contempt referred to in clause (3) of the first paragraph of this section is alleged to have been committed,* and only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

Related Federal Statute

United States Code, Title 18:

Sec. 1071. **Concealing Person from Arrest.** Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined not more than $1,000 or imprisoned not more than one year, or both; except that if the warrant or process issued on a charge of felony, or after conviction of such person of any offense, the punishment shall be a fine of not more than $5,000, or imprisonment for not more than five years, or both. *(As amended August 20, 1954, c. 771, 68 Stat. 747.)*

Related State Statute

Louisiana Revised Statutes 14:115

Criminal anarchy is:

(1) The advocating or teaching, in any manner, in public or private, of the subversion, opposition, or destruction of the government of the United States or of the State of Louisiana by violence or other unlawful means; or

(2) The organizing or becoming a member of any organization or society which is known to the offender to advocate, teach, or practice the subversion, opposition, or destruction of the government of the United States or of the State of Louisiana by violence or other unlawful means.

Whoever commits the crime of criminal anarchy shall be imprisoned at hard labor for not more than ten years. *(Acts 1942, No. 43, Section 1, Article 115.)*

STATEMENT OF THE CASE

This action was commenced in the United States District Court for the District of Columbia for injunctive and declaratory relief against the Attorney General of the United States, the Director of the Federal Bureau of Investigation, and the Chief of the Metropolitan Police Department of Washington, D. C. Petitioners were members of the Black Panther Party having important duties to perform in preparation for the Revolutionary Peoples' Constitutional Convention then scheduled to be held in Washington, D. C. in November, 1970. The suit sought to restrain the named government officials and their agents from threatening or attempting to arrest petitioners, or removing them from the District of Columbia, or otherwise interfering with their free exercise of political and civil rights here on the pretext of executing certain warrants of arrest for violation of the Fugitive Felon Act (18 USC Sec. 1073). These warrants were based on the claim that petitioners violated federal law when they left the State of Louisiana and returned to their home in Washington, D. C. for the purpose of avoiding prosecution under Louisiana's "Criminal Anarchy" statute (La. Rev. Stat. 14:115). Petitioners formally alleged

that the Fugitive Felon Act was repugnant to the Constitution as applied to such a case, that the warrants had been issued without the prior approval of the Attorney General or an Assistant Attorney General, as required by law, and that they were issued in bad faith and for the purpose of harassing political activists. Petitioners requested a three-judge court be convened as provided in 28 U.S.C. Sec. 2284 to hear and determine the constitutional claims. The District Court denied the request for a three-judge court on the ground that the questions raised were insubstantial, denied a temporary restraining order and preliminary injunction, and dismissed the complaint on its merits.

The Court of Appeals, without ruling on the substantiality of the issues raised by the complaint, dismissed the case because Schoop was a "fugitive," since he did not surrender to federal authorities to answer the subject warrant; and because Dawkins' case was "moot," since the government dismissed the warrant against him after he surrendered and while the case was on appeal.

The complaint alleged the following facts.

At a press conference in New Orleans, September 18, 1970, the District Attorney for that city announced that his office had placed "charges of criminal anarchy against five men, all from other cities, in connection with the Black Panther operation here." Among the five identified were petitioners, both specified as being from Washington, D. C. and said to be "at large and being sought." According to the prosecutor, the "suspects at large left the city after the Panther headquarters was set up here and shortly before violence erupted between Panthers and police in the Desire area last Monday night. . . ." (par 4 of complaint).

Having read national news reports of this press conference, petitioners, through their attorneys, contacted Washington, D. C. prosecutors on September 22, 1970 in an effort to avoid any unnecessary local confrontation. (Black Panther Party members in Washington, D. C., through the inter-

vention of counsel, had previously appeared voluntarily in court to answer criminal charges against them without the necessity for arrests or the issuance of warrants.) In the course of such inquiries counsel were informed that agents of the F.B.I. had warrants for the arrest of petitioners claiming that they violated the federal Fugitive Felon Act (Section 1073) by leaving Louisiana and returning to their home in Washington, D. C., because, it was asserted, they left Louisiana for the purpose of avoiding prosecution under that State's "Criminal Anarchy" statute (par. 5 of complaint).

Counsel for petitioners protested that the charge of "Criminal Anarchy" was farcical; that the so-called "Criminal Anarchy" statute was plainly unconstitutional because of its chilling effect on the exercise of First Amendment rights; and that, completely apart from legal questions, the Attorney General and the National Government should not become participants in the enforcement of such repressive state laws and prosecutions (par. 6 of the complaint). It was further pointed out that prosecutions under Section 1073 by its own terms could only be initiated "upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated" (par. 7 of the complaint).

Harassment of a Political Movement

While these representations of counsel were presumably being considered by the Department of Justice, F.B.I. agents began interrogating, harassing and threatening local Black Panther Party members, people who had attended Black Panther Party fund-raising events and persons who had offered legal assistance to petitioners (par. 8 of the complaint).

Under 18 U.S.C. Section 1071 (concealing persons from arrest) almost anyone who communicates with a person sought under a federal warrant may subject himself to a $5,000 fine and five years imprisonment for "harboring" a fugitive. Thus, through Section 1071, the effect of a Section 1073 warrant extends to innumerable people throughout the United States whose association with such "fugitive" is only nominal or hypothetical. Affidavits showing the harassment and intimidation of such persons were attached to the complaint.

The affidavit of James Williams, area captain of the Black Panther Party, shows that on the same day petitioners' lawyers were conferring with the United States Attorney's office, Williams was interrogated and threatened by an F.B.I. agent concerning the whereabouts of Dawkins and Schoop. The next evening the automobile which Mr. Williams was driving, accompanied by a national Black Panther Party leader, was forced off the highway by F.B.I. agents. The occupants of the car were forced to get out, held at gun point with hands up, searched, interrogated and threatened with five years imprisonment for hiding a fugitive.

During both incidents, F.B.I. agents threatened to "vamp on" (to attack) Black Panther Party Headquarters if Williams did not talk. At no time, however, did the F.B.I. agents indicate they had any reason to believe petitioners were at the Panther office.

The affidavit of Janna Alida Kaufman, a housewife, shows that her only contact with the Black Panthers was to attend a fund-raising party for them. On the morning after petitioners' counsel conferred with the U. S. Attorney's office here, F.B.I. agents entered Mrs. Kaufman's home. They accused her of harboring a fugitive, made direct and indirect representations about the dangerous character of the Black Panther Party in general and one of the petitioners in

particular and recommended that she read about their alleged atrocities in Time Magazine. The agents indicated considerable knowledge of her personal life, interrogated her about private matters, and threatened her with a fine and imprisonment for harboring a fugitive.

The affidavit of Maureen Malone, a recent graduate of Howard Law School, not then admitted to the Bar, shows that she had been working as a volunteer assistant to counsel for petitioners. The day after petitioners' counsel contacted the United States Attorney's office here, four persons who identified themselves as agents of the F.B.I. came to her apartment, stating they were looking for Willie Dawkins. With her consent, they searched her apartment; and although fully informed that Miss Malone was working for petitioners' counsel on the Dawkins case, the agents demanded information from her as to his whereabouts. Being advised that she did not know, an agent then informed her that harboring or giving aid and comfort to a fugitive was a crime and that as a law student she "wouldn't want any trouble with the Bar."

Bad Faith Administration

It was also alleged in the complaint that past practices in the enforcement of the Fugitive Felon Act indicate that "federal authorities do not intend a bona fide prosecution under said statute; that the consistent practice thereunder has been to make arrests under it, turn the prisoner over to local authorities, and then drop the federal charge" (par. 9 of complaint).

Many have given bail under this statute, it was alleged, only to find that the processes of the court had been used to facilitate serving extradition warrants for new and different

crimes by local authorities.[1] The federal charge, which was a sham to begin with, is then dropped. The required evidence of a specific intent to flee for the purpose of avoiding prosecution is probably seldom available in the vast bulk of warrants issued under the Fugitive Felon Act.[2] It certainly was not shown by the affidavit in support of the warrant

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[1] In the *New York Times* October 15, 1970, page 1, reporting the case of Angela Davis, it was said "Sources at the United States Attorney's office said that the noon arraignment on a Federal warrant of unlawful flight to evade prosecution was in effect a holding action that would keep Miss Davis in custody until the California warrants for murder and kidnapping could be brought here by a courier.

"The source said that it was conventional practice in cases of this sort for the state warrants to take precedence over Federal ones.

"With the arrival here of the California warrants, Miss Davis and her attorney, John J. Abt, were summoned once again to the Commissioner's office, where Mr. Bishopp revoked her bail and released her in her own recognizance. Her Federal handcuffs were removed.

"Then Detective Alfred C. Halaikis of the city's safe and loft squad stepped forward and said, 'Miss Davis, you're under arrest,' and placed her hands in city handcuffs in support of warrant."

[2] In the case of *Lupino v. United States*, 268 F. 2d 799 (8th Cir. 1959), the court upheld the instruction of the trial judge that, absent proof of knowledge that a criminal proceeding had actually been initiated, the jury had to find the defendant guilty of the original substantive crimes charged (murder and kidnapping in Minnesota) if the defendant was to be convicted under Section 1073 of fleeing the state to avoid prosecution. The instructions also included the following language regarding intent: "the intent to avoid prosecution does require that the defendant be aware at the time of his interstate travel of the fact that the crime of murder or kidnapping of DeVito had been committed and that at that time the defendant had an apprehension that he would be or might be the subject of a Minnesota prosecution for such crime; and further that such apprehension on the part of the defendant or defendants was a reasonable one and not merely a figment of his imagination." 268 F.2d at 802, Footnote 1.

See also *Reis v. United States Marshall*, 192 F. Supp. 79 (1961) and *State v. Miller*, 412 P 2d. 240 (N. M. 1966).

in the present case.[3] Hence the reason for almost invariably dropping the fugitive charge at the preliminary hearing,[4] as was subsequently done in the case of petitioner Dawkins as discussed *infra.*

Furthermore, it was alleged, past experience of Black Panther Party members with the administration of this statute indicates that respondents will do everything in their power to thwart judicial supervision of their actions (par. 9 of the complaint).[5]

The complaint therefore alleged that "in the light of defendants' administration of this statute and the experience under it with which plaintiffs are familiar, plaintiffs are afraid to enter the courthouse to invoke judicial aid, or even to communicate and consult with their lawyers" (par. 10

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[3]See note 7, *infra.*

[4]The legislation history of the 1961 Amendment of Section 1073 contains a letter to Congressman Emanuel Celler from then Deputy Attorney General Byron R. White, which states that since its inception, the government has attempted prosecutions against less than one percent of the defendants charged under the Act. During the first ten years that the statute was in operation, 9,093 people were arrested on Fugitive Felon warrants but only forty-eight were prosecuted. Between 1956 and 1960, inclusive, there were 5,380 arrests under the statute but only twenty-five convictions. (Congressional Record–Senate September 20, 1961, p. 20463) This comports with current practice since the 1961 amendment. See footnote 1 *supra.*

It was recently disclosed that a fabricated charge of arson was placed against H. Rap Brown by a Maryland States Attorney to insure that the F.B.I. could be brought into the case under the Fugitive Felon Act if Brown fled prior to trial. *Washington Post,* January 15, 1971, pp. 1 and 21.

[5]Cited in the complaint as illustrative of this last proposition was the experience of Bobby Seale being transferred from San Francisco to Chicago in a secret cross-country motor trip despite a California federal

of complaint).[6]

Therefore when petitioners made their first application to the courts on September 25, 1970, *Dawkins, et al. v. Mitchell, et al.* C. A. No. 2865-70, USDCDC, they appeared only through counsel and their actual whereabouts remained secret. The court, after requiring the parties' residence address to be inserted in the complaint, granted a temporary restraining order September 28, 1970. However, the next day it vacated this order and dismissed the complaint "for lack of jurisdiction over the subject matter." The Court of Appeals affirmed the dismissal, *Dawkins v. Mitchell,* No. 24,662, decided October 9, 1970, but on the entirely different ground that petitioners could not invoke the aid of the court to adjudicate the case as long as they were "fugitives." The dismissal, however, suggested that the case could be considered on its merits if petitioners followed a different prodecure outlined by the Court at pp. 5-6 of the slip opinion:

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court order that he not be moved. The government supervisors claimed that they could not reach their subordinates in time to prevent the removal and their subordinates carefully prevented Mr. Seale from communicating with anyone throughout the three-day trip. Relevant pages from Mr. Seale's book, *Seize the Time,* Random House, 1970, were attached to the complaint.

[6] Petitioner Schoop, for the same reason, was afraid to appear at a hearing September 25, 1970 to set a date for arguing motions in another criminal case pending against him in which he had pleaded not guilty to an indictment charging him with assault on a police officer. He had previously appeared in court voluntarily in that case, and was, until his nonappearance on September 25, 1970, free on personal recognizance.

"However, the threat of being arrested by defendants upon the fugitive warrants described, coupled with the prospect of being taken to Louisiana without an opportunity to raise constitutional objections before removal persuaded him to file for injunctive relief on September 25, instead of appearing personally in court."

"At oral argument appellants' counsel protested that for appellants to place themselves physically within the jurisdiction of this court would be in effect to moot their entire challenge to the constitutionality and/or enforceability of Section 1073 against them in this case. Not so. Appellants could easily have filed this action, advanced every legal argument they have urged now, asked not for a prohibition against the Attorney General and the Director of the Federal Bureau of Investigation seeking them out as fugitives (one of the duties imposed by law upon these officials), but asked for a similar injunctive order restraining those same two officials from either removing the appellants from the District of Columbia to Louisiana to answer the federal charge of unlawful flight under Section 1073 or from turning appellants over to the local authorities in the District of Columbia for extradition under the Constitution to answer in Louisiana state court the charges filed there.

"Immediately after filing such a proceeding, which could have been this same proceeding with the modifications suggested, and which, if appellants were upheld on either of several of their legal theories, would afford appellants complete protection, appellants could have walked into the United States Marshall's office and presented themselves to answer the fugitive warrant, called the Marshall's attention to their case already pending in the District Court, and been speedily set free on bail. Then the District Court, and perhaps subsequently this court, could have adjudicated the legal issues raised here, with the assurance that the appellants were ready to abide by the decision, win or lose. As it is, appellants have attempted to invoke half our jurisdiction, i.e., the winning side."

October 23, 1970, petitioners filed the present complaint in which they alleged, without waiver of their previous position, that they "desire and intend to follow the procedures for invoking this court's jurisdiction in answering the fugitive warrants outlined by the Court of Appeals, and hereby tender such performance under an appropriate protective order of this court." (par. 13 of the complaint). An initial application for a temporary restraining order was rejected.

Shortly thereafter petitioner Dawkins surrendered himself to an agent of the F.B.I. He was taken before the United States Magistrate. The United States Attorneys office in New Orleans requested a $50,000 bond. The local United States Attorney asked $25,000 and the Magistrate set bond at $5,000. (Affidavit of David T. Austern, Assistant United States Attorney). Being unable to make bail, petitioner Dawkins spent the next five days in jail until October 28, 1970, when the Magistrate ordered his release on personal recognizance.

An amended motion for temporary restraining order was presented to the court October 27, 1970. The court refused to act on this motion, but after hearing oral argument, filed a memorandum on November 6, 1970, holding that Schoop's offer to surrender under a protective order of court did not change his "fugitive" status, and as to him the case would not be considered. Moving to a consideration of Dawkins' case, the court held the constitutional questions presented insubstantial. An order dismissing the complaint was entered November 9, 1970. An appeal was noted the same day.

The following day, November 10, 1970, while emergency motions were pending in the Court of Appeals, petitioner Dawkins appeared at a preliminary hearing before the United States Commissioner upon the pending Fugitive Felon charge. The government moved for a continuance

which counsel for Dawkins opposed. The Magistrate took the government's motion for continuance under advisement and then heard Dawkins motion to dismiss the complaint because of the factual insufficiency of the supporting affidavit.[7] Dawkins' counsel pointed out that there was no evidence in the complaint that a crime had been committed in Louisiana, nor that there had been any violation of the Louisiana Criminal Anarchy Statute, and that there was no proof of a flight from that state with intent to avoid prosecution. The Commissioner ruled that "the affidavit filed with the complaint goes only to the issue of search and

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[7] The undersigned complainant being duly sworn states: That on or about September 21, 1970, at New Orleans, Louisiana in the Eastern District of Louisiana Willie Lee Dawkins did unlawfully, knowingly and willfully flee in interstate commerce from New Orleans, Louisiana to New York City, New York with the intent to avoid prosecution for the offense of criminal anarchy, a felony under the laws of the State of Louisiana.

And the complainant states that this complaint is based on the fact that Sgt. Ben Windstein, New Orleans Police Dept. advised that Dawkins has been charged in affidavit No. 216580 with a violation of Louisiana Revised Statute 14:115, Criminal Anarchy, which is a felony under the laws of the State of Louisiana. A reliable informant of the F.B.I. who has furnished information on Black Panther Party activities and leaders for a period of two years saw Willie Lee Dawkins in New York City, New York on 9/19/70. Special Agent Robert Shea of the F.B.I. advised that this informant has not furnished any information proven to be unreliable and that the informant has furnished information on more than 30 occasions which was proven to be accurate.

And the complainant further states that he believes that Special Agent Robert Shea, F.B.I., Sgt. Ben Windstein, New Orleans Police Dept. are material witnesses in relation to this charge. /s/ Delbert W. Hahn, Special Agent, F.B.I. Sworn to before me, and subscribed in my presence, September 21, 1970, Ingard O. Johannesen, United States Commissioner.

seizure, and that, consequently, whether the factual statement set forth in the affidavit was or was not sufficient before the Commissioner is not a material question before me at this time. The allegation parts of the complaint are sufficient . . . to call for a removal hearing" (Tr. p. 12-13). The Magistrate therefore denied the motion to dismiss. After this motion was denied the government moved to dismiss the warrant and the Magistrate granted it (Tr. p. 19).

Immediately thereafter, petitioner Dawkins was arrested on a local extradition warrant by an agent of respondent Wilson, held in jail for half a day and then again released on personal recognizance. Extradition proceedings were continued once at the request of the government, and at the second extradition hearing, the government dismissed the extradition warrant.

Petitioner Schoop continues to make himself available to surrender and answer the warrant under a suitable court order which would preserve the status quo until such time as there is a final adjudication of this case. In his amended motion for temporary restraining order, it was asserted that although Schoop had not yet appeared to answer the warrant under the prodecure outlined by the Court of Appeals, "the verified complaint herein represents his desire and intention to do so under a protective order of this court, and his counsel represents to the court that they have received assurances that he will present himself within five days of the entry of [such] order."

The Court of Appeals, however, dismissed Schoop's case because he was still a fugitive and dismissed Dawkins case because it was moot.

REASONS FOR GRANTING THE WRIT

The importance of this case lies in the potential of the Fugitive Felon Act to create what amounts to a national police force whose invasions of First Amendment rights are effectively removed from judicial scrutiny.

Prior to 1961, the Fugitive Felon Act purported to cover state prosecutions for only certain specifically designated crimes–murder, kidnapping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, arson punishable as a felony or extortion accompanied by threats of violence, or attempts to commit any of the foregoing offenses. All of these crimes had a fairly certain meaning throughout the nation growing out of years of common law and statutory tradition. None of them, as such, involved the possibility of infringing on First Amendment rights. The constitutionality of the Fugitive Felon Act as it read prior to the 1961 amendment was sustained in *Hemans v. U. S.*, 163 F.2d 228 (6th Cir. 1947), cert, denied, 332 US 801 (1947). The proposal in 1961 to include any crime "which is a felony under the laws of the place from which the fugitive flees," however, troubled the consciences of many Congressman and Senators. For example.

"SENATOR HART . . . Some of us sensed that the proposal if adopted, might very well be a step along the road to a national police force, in the form of the FBI . . . . [W]e go too far when we say in effect that any State which describes something to be a felony can virtually write the ticket and bring Federal police activity into force when anyone flees that state to avoid prosecution for that which, because of tradition and culture, that State regards as a felony. It may well be that the individual who flees enters a jurisdiction where the activity is not a felony, or is not a misdemeanor, and indeed may be quite appropriate or recognized in the community . . . .

"In summary, the suggestion of the Senator from New York [Mr. Javits] would be that we pinpoint explicitly the additional crimes, flight from which would constitute a violation of the Fugitive Felon Act. . . . (Congressional Record, September 20, 1961, p. 20463-20464.)

"SENATOR NEUBERGER . . . . In Georgia, you can go to jail for up to 4 years for stealing just one chicken . . . . [I]n New York State, any person staging a masquerade or a masked ball without prior permission can be jailed for up to 2 years . . . . On the books of some Southern States, there are laws aimed specifically against the National Association for the Advancement of Colored People . . . .

"However, merely because some jurisdictions use its State laws to harass the NAACP and other advocates of civil rights, I see no reason why it should become a Federal crime punishable by 5 years in jail or a $5,000 fine, or both, to cross a State line to avoid prosecution for an attempt to commit a crime defined by State law that may be questioned because of its constitutionality . . . . (Congressional Record, September 20, 1961, p. 20464-20465).

* * *

Congressman Libonati *in the House Committee Minority report (US Code Congressional Service, 1961, p. 3244):*

> No one has stated just what State crimes are covered under the new Federal law proposed by this bill except in general language. The majority report states, vaguely that a number of serious crimes not presently included with the statute will be included.
>
> It does not identify or enumerate those crimes. It does

not enumerate even some of them. These circumstances, in my view, add up to an improper way to legislate on a far-reaching proposal submitted by a responsible Federal agency. This is especially so when the provisions of this bill can and will vitally affect the lives and constitutional privileges of thousands of persons and their families.

Even if this broad delegation is permissible under *U. S. v. Sharpnack*, 355 US 286 (1958), upholding the adoption of state criminal laws for federal enclaves within the states, there still remains a very serious question, specifically reserved in the *Sharpnack* case:

> We do not now pass upon the effect of the Assimilative Crimes Act where an assimilated state law conflicts with a specific federal criminal statute . . . . or with a federal policy . . . (n. 9, p. 293).

That question is clearly involved here. The federal prosecution is bottomed on an overly broad state law, Louisiana's Criminal Anarchy Statute, which fails to draw a clear distinction between violence and speech. "It sweeps within its condemnations speech which our Constitution has immunized from governmental control," *Brandenburg v. Ohio*, 395 US 444, 448, striking down the Ohio "Criminal Syndicalism" statute. In the light of the *Brandenburg* case, the Louisiana statute would seem to be clearly unconstitutional. But even if not clearly unconstitutional, there is certainly a "substantial question" about its constitutionality.

Thus, this is precisely the kind of prosecution that Congressional proponents of the 1961 amendment to the Fugitive Felon Act faithfully promised their colleagues and the nation

would never be instituted. Senator Keating, one of the sponsors of the bill, stated (Congressional Record, September 20, 1961, p. 2466):

> Some question has arisen as to a possible misapplication of this act in cases involving civil rights matters. I have thoroughly explored this problem. If I believed that there was substance to this fear, this bill would not have my support. I am convinced, however, in looking into this matter, that broadening the bill to make it applicable to all felonies will not raise any substantial civil rights problems. Let me be specific. Suppose an attempt were made by a State to obtain the return of a freedom rider for prosecution in the State on a disorderly conduct or similar charge. In my opinion, such an attempt would fail for two reasons. First, because such charges do not constitute felonies, and second, and this is most important, there is nothing in this act which would permit the return of any fugitive to face charges which cannot be sustained under the provisions of the Constitution. It is my clear understanding and that of other Senators with whom I have discussed this measure, that the language of this bill requires the apprehension of fugitives only when the charges against them are valid under the Constitution . . . . No U. S. Attorney could ignore the constitutional limitations implicit in the bill in carrying out his responsibilities. Certainly there will be no prima facie case in any situation in which the so-called fugitive is wanted for prosecution under an unconstitutional State statute, no matter what the penalty under the State statute may be. This is confirmed in a letter which was recently submitted by the Department of Justice on this measure which states:
>
> > It is most unlikely that any U. S. Attorney would institute any proceedings by issuance of a complaint or warrant arising out of an alleged violation of a State statute believed to raise substantial issues under the U. S. constitution.

This is the only interpretation of the statute, with or without the amendment proposed in the pending bill, which I believe is possible. In fact, I think any U. S. attorney or Attorney General who attempted to apprehend a citizen in derogation of this limitation would be violating his solemn obligation to obey the Constitution in the performance of his duties.

The House Floor amendment sponsored by Congressman Libonati (who wrote the House Committee minority report, 1961 US Code Congressional Service 3244-3247) was also directed at preventing this kind of official abuse of Constitutional rights. His amendment (Congressional Record, August 23, 1961, p. 16862) which became law, requires that all prosecutions under this statute be initiated only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

But the Fugitive Felon Act now operates to multiply and expand, throughout the entire United States, the chilling effect of each and every state statute which infringes on First Amendment rights. Federal investigatory facilities and judicial machinery are enlisted in aid of what was previously only local repression of free speech. Statutes such as "Criminal Syndicalism" in Ohio and "Criminal Anarchy" in Louisiana are given a new and frightening national dimension by the Fugitive Felon Act. Federal intervention brings with it the entire FBI apparatus, armed with warrants of arrest that can be summarily executed anywhere in the United States.

Furthermore, Section 1073 cannot be read without considering its direct relationship to Section 1071, making it a crime to "harbor" a person sought under a federal warrant. This provides a clear point of entrance for widespread repression of a controversial political movement. As the affidavits attached to the complaint show, the fugitive

warrants in this case provided the occasion for investigating and threatening innumerable people having only remote or hypothetical connections with the alleged "fugitives." Not only were leaders and adherents of the Black Panther Party harassed, but subtle yet extraordinarily effective threats were made against persons having only the most tangential contact with the party: people attending its fund raising affairs, and law students offering legal assistance.

As Senator Hart says, the FFA creates a national police force in the form of the F.B.I. When warrants issuing under that act can be based on a state statute which makes no clear distinction between criminal activity and free speech, we have not merely a national police force, we have a national *political* police force.

Ordinary defense of a criminal action does not provide an adequate remedy for invasion of First Amendment rights in these circumstances, *Dombrowski v. Pfister*, 380 US 479 (1964); *Sheridan v. Garrison*, 415 F.2d 699, 703-707 (5th Cir., 1969). Thus far, every time petitioner Dawkins has pressed for public vindication in a criminal court, the charges have been dropped. Both the federal fugitive warrant and the local extradition warrant now stand dismissed; but there is nothing to prevent respondents from issuing them again. Furthermore, petitioner Dawkins has had to remain in hiding for many months, was prevented from working on the Revolutionary Peoples' Constitutional Convention here in November, 1970, spent six days in jail and attended innumerable court hearings.

The alternative equitable remedies suggested by respondents prove a further vice of the statute: that repressive action under the Fugitive Felon Act, as it now functions in respondents' hands, is immune from judicial scrutiny. Petitioners, respondents say (1) may go back to Louisiana and

raise the constitutional question of the *Louisiana statute* in a local federal court suit; or (2) they may voluntarily surrender so that, no longer being "fugitives,"[8] they may invoke federal court intervention here. But when they surrender, without a protective order of the court, the government will dismiss the warrant and then claim the case is moot,[9] leaving the petitioners no avenue for challenging unconstitutional application of the act by the government. This Court, therefore should determine whether this subversion of First Amendment rights should be allowed to continue free of judicial scrutiny.

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[8]Defendant Schoop is not a convicted criminal who escaped from jail or skipped bond pending appeal; therefore the principals set forth in *Eisler v. United States,* 338 US 189 (1949), writ of certiorari dismissed, 338 US 883 (1949), and *Molinaro v. New Jersey,* 396 US 365 (1970), do not apply. Schoop has made, and continues to make, repeated attempts through counsel to surrender under a protective order of the court. Furthermore, it was improper for the court below to dismiss the case for lack of jurisdiction without a hearing to determine petitioner's whereabouts and the circumstances under which he left the jurisdiction. *United States v. Press,* 401 F.2d 499, 500 (3d Cir., 1968). In any event, because of the special circumstances of this case the court should retain jurisdiction under Rule 20 of the Supreme Court Rules.

[9]In an action for injunctive relief, "the voluntary discontinuance of an alleged illegal activity [on the part of the defendant] does not operate to remove a case from the ambit of judicial power." *Walling v. Helmerich & Payne,* 323 US 41, 43. In *United States v. W. T. Grant Co.,* 345 US 629, the Court spelled out the criteria for deciding if a defendant should be allowed to circumvent a judicial evaluation of its alleged illegal actions when these actions have ceased. The Court held that the injunctive action was not moot if (1) the defendant would be free to resume its illegal actions in the future, and (2) there existed a public interest in "having the legality of the practices settled." 345 US at 632. It is the defendant's burden to establish that there is "no reasonable expectation that the wrong will be repeated." *Id.* at 633.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted

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APPENDIX

OPINION OF THE DISTRICT COURT

ROBERT SCHOOP, ET AL., Plaintiffs, v. JOHN N. MITCHELL, ET AL., Defendants. Civil Action No. 3158-70.

Before the Honorable Oliver Gasch

[Filed November 11, 1970]

MEMORANDUM

This matter came on for hearing and was argued by respective counsel in open Court on plaintiffs' motion for temporary restraining order and for the convocation of a three-judge court, as well as on the Government's motion to dismiss, and upon consideration of the extensive briefs filed by the respective parties, the Court concludes that the Government's motion to dismiss is well taken and does grant the same.

Plaintiff Schoop remains a fugitive and is not entitled to seek relief in this Court. See *Molinaro v. New Jersey*, 396 U.S. 365 (1970). See also *Willie Lee Dawkins v. Mitchell*, No. 24662 (D. C. Cir. October 9, 1970).

Following the decision in the last noted case, plaintiff Dawkins surrendered and accordingly it becomes appropriate to consider the authorities set forth by respective counsel. Plaintiff Dawkins is charged in Louisiana with violation of the state Criminal Anarchy statute. Having left that jurisdiction and having fled to this jurisdiction, he was charged with violation of 18 U.S.C. Sec. 1073, flight to avoid prosecution.

The thrust of the complaint is that 18 U.S.C. Sec. 1073, a Federal statute respecting flight to avoid presecution, is

unconstitutional because of overbreadth and vagueness. The Court rejects this contention for the reason that in *United States v. Sharpnack,* 355 U.S. 286 (1958), the Supreme Court sustained the constitutionality of a comparable statute. Involved in that case was the Assimilative Crimes Act. In that Act, Congress made state criminal acts applicable to Federal enclaves located in the state unless pre-empted by Federal law or policy. The attack upon such legislation in *Sharpnack* focused upon the same criticism now leveled at Section 1073 of Title 18 - overbreadth and vagueness. It is interesting to note that in its discussion of the issue in *Sharpnack* the Court made reference to Section 1073 of Title 18 as one of the examples of prospective utilization by Congress of state legislation, both existing and prospective. In this connection, the Court referred with approval to *Hemans v. United States,* 163 F.2d 228 (6th Cir. 1947), which concerned as aspect of the predecessor statute of 18 U.S.C. Sec. 1073. The applicable portion of the predecessor statute, namely, travel in interstate commerce to avoid giving testimony in any criminal proceeding in the place where the commission of a felony is charged was challenged for constitutionality. The Sixth Circuit rejected the contention of unconstitutionality insofar as the predecessor statute was concerned. 355 U.S. at 294-95. See also Note 47 of 70 Harv. L. Rev. 689, 691 (1957).

Reliance is placed upon two recent Supreme Court cases by plaintiffs: *Dombrowski v. Pfister,* 380 U.S. 479 (1965), and *Brandenburg v. Ohio,* 395 U.S. 444 (1969). These cases, however, are of interest primarily insofar as the Louisiana statute is concerned. Challenge, however, to the constitutionality of that statute should be raised in the courts in Louisiana. 28 U.S.C. Sec. 1391(b), *Sutton v. City of Philadelphia,* 286 F.Supp. 148 (S.D.N.Y. 1968); see also, *Eastern States Petroleum Corp. v. Rogers,* 280 F.2d 611 (D. C. Cir. 1960).

In view of the position the Court has taken with reference to the Government's motion to dismiss, reference of the case for the appointment of a three-judge court is clearly inappropriate. See *Ex Parte Poresky*, 290 U.S. 30 (1933), and *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS

Robert Schoop, et al., Appellants v. John N. Mitchell, Attorney General of the United States, et al.

Before: Wright, Robb and Wilkey;
Circuit Judges, in Chambers

[Filed January 22, 1971]

ORDER

On consideration of appellants' motion for (1) injunction pending appeal (2) summary reversal, and (3) to dismiss appeal as moot or for summary affirmance,* of the motion of appellees Mitchell and Hoover to dismiss appeal for mootness or for summary affirmance, the opposition of appellee Jerry V. Wilson to motion of appellant for injunction pending appeal and for summary reversal, and of the opposition of appellees Mitchell and Hoover to motion for injunction pending appeal and summary reversal, and it appearing to the Court that appellant Schoop has not submitted to federal custody, as this Court's opinion in *Dawkins v. Mitchell*, No. 24,662 (D. C. Cir., October 9, 1970), requires him to do in order to obtain adjudication of his claims, and that the warrant for the arrest of appellant Dawkins for violation of 18 U.S.C. Sec. 1073 (1964) has been dismissed, it is

*an apparent typing error. Appellees, not appellants, made these motions as the language following makes plain.

ORDERED by the Court that the dismissal of appellant Schoop's action is summarily affirmed, and it is

FURTHER ORDERED by the Court that the dismissal of appellant Dawkins' action is vacated and this case remanded to the District Court with instructions to dismiss Dawkins' action as moot. See *United States v. Musingwear, Inc.*, 340 U.S. 36 (1950); *Gaddis v. Dixie Realty Co.*, 136 U.S. App. D. C. 403, 420 F.2d 245 (1969).

Per Curiam